Supreme Court, U.S.
FILED
JAN 27 1994
OFFICE OF THE CLERK

No. 93-5161

In The

Supreme Court of the United States

October Term, 1993

WILLIAM ARNOLD PROCTOR,

Petitioner,

v.

CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of California

PETITIONER'S BRIEF ON THE MERITS

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(Appointed by this Court)
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QUESTIONS PRESENTED

Does a death sentence violate the Eighth Amendment requirement that the jury be given "principled guidance" in determining who is to receive a death penalty, when that sentence is imposed by a jury instructed to weigh aggravating against mitigating factors, but:

(a) Permitted to consider undefined "circumstances of the crime," as well as other ambiguous terms, as aggravating factors;

(b) Not instructed whether listed factors are to be treated as aggravating or mitigating; and

(c) Encouraged to treat the absence of a mitigating factor as an aggravating circumstance?

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OPINION BELOW

The opinion of the California Supreme Court, dated December 28, 1992, is reported at 4 Cal.4th 499, 15 Cal.Rptr. 340, 842 P.2d 1100 [JA 95]. The California Supreme Court denied rehearing on March 10, 1993.[1]

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. §1257.

APPLICABLE CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS

In addition to the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, this case involves California Penal Code §§190.1 through 190.4, set forth following the conclusion to this brief.

INTRODUCTION

California death penalty procedure, as applied to petitioner, did not give the jury meaningful guidance about how to determine whether to impose the death penalty. The vaguely written statute allowed the state to

[1] "JA" refers to the Joint Appendix. The record on appeal consists of the clerk's file, cited as "CT", and the reporter's transcripts from Shasta County, where the guilt phase was tried ("Shasta RT"), and Sacramento County, where the penalty phase was tried ("Sacto RT").

transform neutral factors and the absence of evidence into aggravating factors.

In California, death penalty cases are tried in separate phases. The trier of fact initially decides if the defendant is guilty of first degree murder. If so, it also decides whether one or more of 27 possible "special circumstances" exists (Penal Code §190.1(a)).[2] If any special circumstance is found true, the defendant is considered "death-eligible", and the case proceeds to a penalty phase (§190.2), at which the jury weighs aggravating factors against mitigating factors to determine whether to sentence the defendant to death or to life in prison without possibility of parole (§190.3).

Neither the list of factors petitioner's jury was instructed to consider, nor any of the individual factors on that list, provided the specific, objective standards this Court requires when a jury is instructed that aggravating factors play a central role in death penalty decision-making.

STATEMENT OF THE CASE

In April of 1982, petitioner, who was then twenty years old, was charged with rape, burglary, and first degree murder involving four "special circumstances" (killing in the course of burglary, killing in the course of

[2] The 1983 version of that statute had 19 subparts, one of which (§190.2(a)(17)) in turn lists nine separate circumstances. The 1993 version adds two more special circumstances.

rape, especially heinous killing,[3] and killing involving torture). The charges stemmed from discovery of the body of 55-year-old Bonita Stendal, who had died of asphyxiation by manual and ligature strangulation [Shasta RT 2875-2876]. Her body also showed stab wounds, injuries from seven to nine blows [Shasta RT 2876-2879, 2886, 2889-2922], and injuries near the vagina caused by a foreign object, possibly a penis [Shasta RT 2913-2920].

The prosecution connected petitioner to the crime by his palmprint on pamphlets in Ms. Stendal's house, a cigarette butt outside a window, a class in which petitioner was taught "trucker's knots," and abrasions and scratch marks on his legs similar to marks the coroner had seen in a sexual assault case [Shasta RT 2410-2411, 2442-2445, 2463-2465, 2495-2496, 2502-2511, 2540-2544, 2560-2568, 2730-2751, 2801-2831, 2828-2832, 2844, 2927-2928].

Petitioner had been at the home of a friend, Robert Manley, the night before Ms. Stendal was killed, but Manley testified that petitioner left at 8:30 p.m. [Shasta RT 2643, 2721-2722]. Manley had been petitioner's cohort in stealing beer in the past, and had made an obscene call to Ms. Stendal the weekend before her death [Shasta RT 2684-2685]. Manley had previously broken into the Stendal home at least twice, and spent a lot of time there with Ms. Stendal's son [Shasta RT 2672-2676, 2758-2764, 2768-2770]. There was no evidence of petitioner's involvement in any of Manley's break-ins.

[3] The "especially heinous" allegation was eventually stricken on petitioner's motion [CT 252-253].

After unsuccessful motions for change of venue [CT 176-177, 180, 196, 274-286], petitioner went to trial. The jury could not agree on guilt until the trial judge commented that he did not believe petitioner's testimony denying involvement in the offense [Shasta RT 3296-3303, 3330-3341], after which the jury found petitioner guilty of first degree murder with special circumstances of rape, torture and burglary [JA 4-6; CT 301-313].

A penalty trial began the morning after the guilt verdict. The jury announced it was deadlocked the same day, and the court ordered a mistrial [CT 314-315]. Shortly after, petitioner again moved for change of venue [CT 323-351]. This motion was granted, and the case was transferred to Sacramento County for retrial of the penalty phase only [CT 351-354]. The retrial was primarily a presentation of guilt phase evidence to the new penalty jury.

At the end of the retrial, the prosecutor argued his theories of first degree murder and special circumstances, and then told the jury that it was "obligated to return" a verdict of death if it found aggravating circumstances outweighed mitigating ones [Sacto RT 1474]. The prosecutor asserted that "there are only two mitigating circumstances and the rest in this case are aggravating," contending in effect that if there was no evidence of a mitigating factor, its absence constituted an aggravating circumstance [Sacto RT 1478]. He concluded with an exhortation that "under the law of California [a death penalty] is necessary" [Sacto RT 1483].

The trial court instructed the jury that petitioner "has heretofore been found guilty of murder in the first

degree" and that the three special circumstances also had been found true, but that such finding "does not in and of itself constitute an aggravating factor or factors." However, if the jury were satisfied beyond a reasonable doubt that petitioner was guilty it could "determine whether or not the crimes and the circumstances thereof constitute an aggravating factor" [JA 76; CT 402].

After defining reasonable doubt, the judge told the jury it should "consider, take into account, and be guided by the following factors, if applicable:[4]

> "(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.
>
> "(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> "(c) The presence or absence of any prior felony conviction.
>
> "(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

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[4] Other than the bracketed material at the very end, this list is a verbatim extract from Penal Code §190.3. The specific factors will be identified in this brief by their statutory designations. For example, "circumstances of the crime" is Factor (a); age is Factor (i).

"(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

"(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

"(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

"(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication.

"(i) The age of the defendant at the time of the crime.

"(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

"(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, [including but not limited to the defendant's character, background, history, mental condition and physical condition]" [JA 77-78; CT 403-404].

This was followed by lengthy jury instructions explaining how to evaluate evidence, and specifying the elements of the crimes and special circumstances the Shasta County jury had found true [CT 405-453]. Then, the judge told the jury it had the duty to decide whether

the punishment should be death or life in prison without possibility of parole, and reiterated that the jury should "consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed" [JA 79; CT 454]. There was no instruction about which factors were aggravating and which were mitigating, nor any instruction defining the words "aggravating" and "mitigating."

The instructions directed the jury that it "shall impose" a death sentence if it found aggravating circumstances to outweigh mitigating circumstances, with aggravating factors to be weighed if the jury found them beyond a reasonable doubt [JA 79; CT 454].

The jury returned a death verdict on a form which read as follows:

> "We, the jury in the above-entitled cause, find that the AGGRAVATING CIRCUMSTANCES outweigh the mitigating circumstances *and therefore* impose the penalty of DEATH as a result of defendant's conviction of murder in the first degree with special circumstances found to be true, relating to the death of BONNIE STENDAL" [JA 94; CT 479, emphasis added].

California law provides for an automatic motion for modification of death judgments (Penal Code §190.4(e)). The trial court denied modification [CT 528-555A]. On petitioner's automatic appeal, the California Supreme Court affirmed the conviction and death sentence, holding that the phrase "circumstances of the crime" is not too vague to define an aggravating factor [JA 156-157; 4 Cal.4th at 550-551], and that the trial judge did not misuse

other factors on the automatic review of the sentence [JA 157-164; 4 Cal.4th at 551-556].

SUMMARY OF ARGUMENT

When a State directs jurors to weigh specified factors in aggravation as the basis for deciding whether to impose a death penalty, the definition of those factors given to the jury must be clear and precise in order to protect against arbitrary and capricious capital sentencing decisions (*Stringer v. Black*, ___ U.S. ___, 117 L.Ed.2d 367, 112 S.Ct. 1130, 1139 (1992)).

California imposes the death penalty on some, but not all, defendants found guilty of first degree murder with special circumstances. California sentencing juries are directed to weigh aggravating factors against mitigating factors. The trial judge reads a list of factors for the jury to weigh, but does not explain which of the listed factors should be treated as aggravating or mitigating, nor even what the words "aggravating" and "mitigating" mean.

This indiscriminate commingling of aggravating and mitigating factors in a single list affronts the Eighth Amendment rule that "[i]f a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not" (*Spaziano v. Florida*, 468 U.S. 447, 460, 82 L.Ed.2d 340, 1045 S.Ct. 3154 (1984)).

As a result of this approach, in many cases (including petitioner's), California prosecutors invite juries to convert the absence of mitigating factors into an aggravating factor or factors, distorting the weighing process by inserting such illusory aggravators. The statute permits arbitrary inconsistencies in the use of identical penalty factors; not even the justices of the California Supreme Court have been able to agree on consistent interpretations. The result is unprincipled, crazy-quilt application of the ultimate penalty.

Moreover, one of the factors on the statutory list is "the circumstances of the crime and the existence of any special circumstances found to be true". This factor is all-encompassing and undifferentiating, and therefore distorts the jury's exercise of discretion in imposing death by injecting arbitrariness. Prejudice to petitioner was especially likely because petitioner's jury was directed that, if it found aggravating factors to outweigh mitigating ones, the death penalty was mandatory.

ARGUMENT

The death penalty is different from any other punishment. This Court has restated that truism time and again (See, e.g., *Harmelin v. Michigan*, ___ U.S. ___, 115 L.Ed.2d 836, 111 S.Ct. 2680, 2702 (1991) (majority opinion and concurring opinion of Kennedy, J.); *California v. Ramos*, 463 U.S. 992, 998-999, 77 L.Ed.2d 1171, 103 S.Ct. 3446 (1983); *Beck v. Alabama*, 447 U.S. 625, 638, 65 L.Ed.2d 392, 100 S.Ct. 2382 (1980); *Gardner v. Florida*, 430 U.S. 349, 357, 51 L.Ed.2d 393, 97 S.Ct. 1107 (1977); *Woodson v. North*

Carolina, 428 U.S. 280, 305, 49 L.Ed.2d 944, 96 S.Ct. 2978 (1976); *Gregg v. Georgia*, 428 U.S. 153, 181-188, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976); *Furman v. Georgia*, 408 U.S. 238, 286-291, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972) (opinion of Brennan, J.), 306-310 (opinion of Stewart, J.); *Reid v. Covert*, 354 U.S. 1, 77-78, 1 L.Ed.2d 1148, 77 S.Ct. 1222 (1957) (concurring opinion of Harlan, J.)).

"The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special ' "need for reliability in the determination that death is the appropriate punishment" ' in any capital case" (*Johnson v. Mississippi*, 486 U.S. 578, 584, 100 L.Ed.2d 575, 108 S.Ct. 1981 (1988)). "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action" (*Gregg v. Georgia, supra*, 428 U.S. at 189).

The jury instructions which led to petitioner's death sentence violated that mandate.

I.

WHEN A STATE USES "AGGRAVATING FACTORS" TO MAKE DEATH PENALTY DECISIONS, THE EIGHTH AMENDMENT REQUIRES THAT SUCH FACTORS PROVIDE CLEAR AND SPECIFIC GUIDANCE.

Modern American death penalty jurisprudence attempts to provide a process which "will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake"

(*Eddings v. Oklahoma*, 455 U.S. 104, 118, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982) (O'Connor, J., concurring). Thus, a death sentence may not stand where the defendant has been precluded from confronting or rebutting penalty phase evidence (*Gardner v. Florida*, 430 U.S. 349, 362, 51 L.Ed.2d 393, 97 S.Ct. 1197 (1977); *Skipper v. South Carolina*, 476 U.S. 1, 90 L.Ed.2d 1, 106 S.Ct. 1669 (1986), or has been permitted to consider an aggravating circumstance that lacks evidentiary support (*Sochor v. Florida*, ___ U.S. ___, 119 L.Ed.2d 326, 112 S.Ct. 2114 (1992)). Likewise, a death sentence is impermissible where the sentencer has considered unreliable evidence (*Johnson v. Mississippi, supra*, 486 U.S. 578), or has been instructed in vague terms (*Maynard v. Cartwright*, 486 U.S. 356, 100 L.Ed.2d 372, 108 S.Ct. 1853 (1988)). The common theme in these cases is that the path to the gas chamber must limit the opportunity for arbitrary choices and unfair procedures (*Sawyer v. Whitley*, 505 U.S. ___, 120 L.Ed.2d 269, 112 S.Ct. 2514, 2520 (1992)). While there is "no one right way for a State to set up its capital sentencing scheme" (*Spaziano v. Florida, supra*, 468 U.S. at 464 (1984); *Baldwin v. Alabama*, 472 U.S. 372, 389, 86 L.Ed.2d 300, 105 S.Ct. 2727 (1985)), whatever process a State chooses to adopt must minimize the risk of capricious imposition of the death penalty. The essence of this requirement, flowing from the Court's holdings in *Furman v. Georgia, supra*, 408 U.S. at 313 (White, J., concurring) and *Gregg v. Georgia, supra*, 428 U.S. at 189, is that "[a] capital sentencing scheme must . . . provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not' " (*Godfrey v. Georgia*, 446 U.S. 420, 427-428, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980), internal

quotation marks omitted. See also, *Maynard v. Cartwright, supra,* 486 U.S. at 362-363).

> "When a state chooses to rely upon the presence of certain aggravating factors in order to satisfy the fundamental constitutional requirement of sufficiently minimizing the risk of wholly arbitrary and capricious action, this Court has repeatedly held that a state's aggravating factors must furnish the sentencer with 'clear and objective standards' that provide 'specific and detailed guidance' "
>
> *Lewis v. Jeffers,* 497 U.S. 764, 774, 111 L.Ed.2d 606, 110 S.Ct. 3092 (1990), quoting
>
> *Godfrey v. Georgia, supra,* 446 U.S. at 428;
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> *Gregg v. Georgia, supra,* 428 U.S. at 198;
>
> *Proffitt v. Florida,* 428 U.S. 242, 253, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1976).

Following the Court's announcement of this requirement in *Furman,* most states undertook to meet it through the approach foreshadowed by the ALI Model Penal Code, using "aggravating circumstances" and "mitigating circumstances" to guide the sentencer's discretion. The states adopted numerous variants of the aggravating/mitigating model, but all of them had a simple, commonsense core. *Aggravating* circumstances were a means for identifying murders that "are particularly serious or for which the death penalty is peculiarly appropriate" (*Gregg v. Georgia, supra,* 428 U.S. at 222 (White, J., concurring)). *Mitigating* circumstances were a means of asking whether there were "any special facts about this defendant [or his

or her crime] that mitigate against imposing capital punishment (e.g., his youth)" (*Id.* at 197 (opin. of Stewart, Powell, Stevens, JJ.)).

Under the various state systems, "death eligibility" may be established solely by conviction of a specifically defined crime, or by conviction of a crime plus a finding of one or more aggravating or (as in California) special circumstances. After this initial finding, in "non-weighing" states (such as Georgia), "aggravating factors as such have no specific function in the jury's decision whether a defendant who has been found to be eligible for the death penalty should receive it under all the circumstances of the case" (*Stringer v. Black, supra,* ___ U.S. ___, 112 S.Ct. at 1136. See also, *Zant v. Stephens,* 462 U.S. 863, 873-874, 77 L.Ed.2d 235, 103 S.Ct. 2733 (1983)). In other, "weighing" states (such as Mississippi and California; please see Section II, below), the actual decision to impose the death penalty requires the jury to weigh the aggravating factor or factors against the mitigating factors.

As this Court has reviewed the various state statutes, it has consistently held that, in weighing states, "use of a vague or imprecise aggravating factor in the weighing process invalidates the sentence and at the very least requires constitutional harmless-error analysis or reweighing in the state judicial system" (*Stringer v. Black, supra,* ___ U.S. ___, 112 S.Ct. at 1140).

The logic of the *Stringer* rule is unmistakable. An aggravating circumstance formula circumscribes jury discretion by focusing it. In that situation, it is up to the courts to guarantee that the focusing is not done through

a distorting lens. Distortion allows the prosecution to misdirect the jury's attention to misleading and nonsensical arguments, creating the danger of capricious action motivated by illusory factors.

At the separate sentencing hearing in *Stringer,* the jury found three statutory aggravating factors. Before this Court, petitioner argued that because *one* of these aggravating factors – authorizing a death sentence for an "especially heinous, atrocious or cruel" murder – was unconstitutionally vague, his death sentence was infected with constitutional error under *Godfrey* and *Maynard.* The State of Mississippi contended, however, that because the narrowing function that made a defendant death-eligible was performed at the guilt phase, there was no impropriety in relying on a vague factor which merely guided the jury's discretion at the sentencing phase.

This Court concluded otherwise, confirming that *Godfrey* and *Maynard* apply not only to circumstances that make a defendant death-eligible, but also to aggravating factors used solely in the weighing process:

> "[I]f a state uses aggravating factors in deciding who shall be eligible for the death penalty *or* who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion.
>
> * * *
>
> " . . . Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance."
>
> *Stringer v. Black, supra,* ___ U.S. at ___, 112 S.Ct. at 1139 (emphasis added).

Stringer does not stand alone; it is one of several decisions of this Court evaluating aggravating factors for clarity, objectivity and principled guidance in situations where the aggravating factor at issue had no role in the death-eligibility decision, but was relevant only in the jury's subsequent weighing of considerations for and against death (*Arave v. Creech,* 507 U.S. ___, 113 S.Ct. 1534 (1993) (*Godfrey* applied to assess constitutionality of aggravating factor even though unchallenged aggravators remained to make defendant death eligible in Idaho); *Sochor v. Florida, supra,* 112 S.Ct. at 2119 (same); *Espinosa v. Florida,* 505 U.S. ___, 120 L.Ed.2d 854, 112 S.Ct. 2926 (1992) (same); *Walton v. Arizona,* 497 U.S. 639, 111 L.Ed.2d 511, 110 S.Ct. 3047 (1990) (same)). State courts throughout the country have likewise recognized that *Godfrey* applies to aggravating factors used in the penalty determination even where the defendant has been properly found death-eligible at the guilt phase (e.g., *Wilson v. State,* 295 Ark. 682, 751 S.W.2d 734, 737-739 (Ark. 1988); *State v. Breton,* 212 Conn. 258, 562 A.2d 1060, 1063-1066 (Conn. 1989); *Haney v. State,* 603 So.2d 368, 387, cert. denied ___ U.S. ___, 122 L.Ed.2d 687 (Ala.Cr.App. 1991)).

The test set forth in *Godfrey* must be applied in California.

II.

AGGRAVATING FACTORS PLAYED A CRITICAL ROLE IN THE DEATH PENALTY DECISION PROCESS IN PETITIONER'S CASE.

Petitioner's jury was instructed that its decision was to be controlled by the weight of aggravating versus mitigating factors:

> "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you *shall* impose a sentence of death" [JA 79, emphasis added; CT 454].[5]

Lest any juror have an iota of doubt, the prosecutor stressed that the jury's weighing was critical to the process of selecting a penalty:

> "So, if you conclude that the aggravating circumstances outweigh the mitigating circumstances, you *are obligated* to return a verdict of death" [JA 23; Sacto RT 1474, 1483, emphasis added].

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[5] After petitioner's trial, the California Supreme Court disapproved any future use of the statute's "shall impose" language in penalty phase jury instructions because that phraseology might mislead jurors about the scope of their sentencing discretion (*People v. Brown*, 40 Cal.3d 512, 220 Cal.Rptr. 637, 709 P.2d 440 (1985), reversed on other grounds, *California v. Brown*, 479 U.S. 538, 93 L.Ed.2d 934, 107 S.Ct. 837 (1987)). The *Brown* court, however, reaffirmed that the jury was to weigh the aggravating and mitigating factors in reaching its sentencing decision (*Id.* at 543-544).

The verdict forms likewise reinforced to the jury that, if it found aggravating factors to outweigh mitigating ones, it should "therefore impose a penalty of death" [JA 94; CT 479], and on review of the sentence pursuant to Penal Code §190.4, the trial judge assumed that the "aggravating circumstances" had controlling importance:

> "The aggravating circumstances do in fact outweigh the mitigating circumstances and therefore . . . the jury's verdict is not only supported by the weight of the evidence, but the Court in its independent review of all the evidence finds the jury's verdict is not contrary to the law or the evidence" [Sacto RT 1628-1629].

In its evaluation of penalty phase jury instruction error, the state supreme court likewise focused on the importance of the weighing process as an element of the jury's "sentencing responsibility":

> "From the arguments both of the prosecutor and defense counsel, and from the instructions, the jurors would have understood that they were required to determine the appropriate penalty for defendant *by weighing the enumerated factors*" [JA 153; 4 Cal.4th at 549, emphasis added. See also JA 164, 4 Cal.4th at 556].

The jury was instructed that it must find aggravating factors beyond reasonable doubt [JA 76, 80; CT 402, 454]. Thus, it is clear the jury actually found at least one aggravating factor to exist, although it is impossible to know which one or ones. Given the central role played by aggravating factors in the argument and jury instructions which led to petitioner's death sentence, and in the state court's subsequent review of that sentence, the principles

set forth in *Stringer v. Black, Maynard v. Cartwright* and *Godfrey v. Georgia* obviously control. *Any* invalid factor used in that process amounted to a "thumb on death's side of the scale" (*Stringer v. Black, supra,* ___ U.S. ___, 112 S.Ct. at 1137).

The day after this Court's grant of certiorari in this case, the state court suggested a contrary conclusion in *People v. Bacigalupo,* 6 Cal.4th 457, 24 Cal.Rptr. 808, 862 P.2d 808 (1993), on remand from *Bacigalupo v. California,* ___ U.S. ___, 121 L.Ed.2d 5, 113 S.Ct. 32 (1992). There, the California court concluded that "[t]he section 190.3 'aggravating' factors in California's capital scheme do no more than direct attention" to "facts about the offense and the offender that will weigh in the sentencing decision in favor of the more severe penalty of death," and therefore the Eighth Amendment principles articulated in *Godfrey* and *Maynard, supra,* do not apply (6 Cal.4th at 477).

Even if that were an accurate interpretation of this Court's Eighth Amendment jurisprudence – but see discussion at pages 10-16, above – the *Bacigalupo* rationale would not change the outcome of petitioner's case, where aggravating factors did not merely "direct attention."

Petitioner's jury was explicitly instructed that in the weighing process it should not only "consider" and "take into account" the factors listed in §190.3, but it should be "guided by" them [JA 77, 79, 80; CT 403, 454]. To guide means "to regulate and manage, direct, or supervise esp. toward some desirable end" (Webster's Third New International Dictionary, p. 1009). The image of a guided missile, going directly to its target, comes to mind.

Petitioner's jury was also instructed, in effect, that its decision should be regulated and directed by a list of factors which (as petitioner will show in Sections III and IV) is so vaguely worded as to be meaningless. Further, the jury was exhorted by the prosecutor that it was "obligated to," and told by the trial judge that it "shall," impose the death penalty if it found aggravating factors outweighed mitigating ones, magnifying the untoward effect of the invalid factors.

With the jury's obligation stated in that manner, application of any invalid factor would create unmistakable danger of randomness and caprice in the jury's decision.

III. THE "CIRCUMSTANCES OF THE CRIME" FACTOR DID NOT GIVE PETITIONER'S JURY MEANINGFUL GUIDANCE FOR MAKING A LIFE OR DEATH DECISION.

In order to satisfy the Eighth Amendment, factors which are weighed by a capital sentencer must "furnish principled guidance for the choice between death and a lesser penalty" (*Richmond v. Lewis,* ___ U.S. ___, 121 L.Ed.2d 411, 113 S.Ct. 528, 532 (1992); *Espinosa v. Florida, supra,* 505 U.S. ___, 112 S.Ct. at 2929; *Sochor v. Florida, supra,* 112 S.Ct. 2114; *Clemons v. Mississippi,* 494 U.S. 738, 108 L.Ed.2d 725, 110 S.Ct. 1441 (1990); *Maynard v. Cartwright, supra,* 486 U.S. at 362-363).

Factor (a) of Penal Code §190.3, the first item petitioner's jury was told to "consider, take into account, and be guided by" in the weighing process, was worded as follows:

> "The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true" [JA 77; CT 403].

This language does not articulate a "clear and objective," "specific," or "detailed" standard (*Lewis v. Jeffers, supra,* 497 U.S. at 774; *Godfrey v. Georgia, supra,* 446 U.S. at 428; *Gregg v. Georgia, supra,* 428 U.S. at 198; *Proffitt v. Florida, supra,* 428 U.S. at 253).

A. GENERIC REFERENCE TO CIRCUMSTANCES DOES NOT ASSIST THE JURY IN DISTINGUISHING ONE CASE FROM ANOTHER.

By including everything, Factor (a) defines nothing. It is ambiguous, rather than clear and specific, and therefore violates the Eighth Amendment.

Every case has circumstances.[6] The "circumstances of the crime" aggravating factor is equally applicable to every defendant who comes before a penalty phase jury. It does not answer the crucial question: How should the jury distinguish those who live from those who die?

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[6] The word "circumstances" means:

> "A specific part, phase, or attribute of the surroundings or background of an event, fact, or thing or of the prevailing conditions in which it exists or takes place: a condition, fact, or event accompanying, conditioning, or determining another:. . . . the sum of essential and environmental characteristics: arrangement, situation, composition or nature of an event or thing . . . "
>
> *Webster's Third International Dictionary,* p. 450.

Using the word "circumstances" as an aggravating factor exemplifies arbitrariness and caprice. It is precisely analogous to the parent-child dialogue: "Why did you do that?" "Because." Factor (a), presented to the jury without any explanation, gave no guidance as to what came within the scope of "circumstances of the crime," or what might make those circumstances "aggravating." It allowed the jury to treat any irrelevancy which may have caught its fancy as a "circumstance of the crime."[7]

There must be a " 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not'," so that similar facts will engender similar results (*Gregg v. Georgia, supra,* 428 U.S. at 188, quoting *Furman v. Georgia, supra,* 408 U.S.

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[7] Reviewing courts are intimately familiar with the problem of applying an overgeneral standard. Thus, Justice Kennedy made this observation about the difficulty of reviewing punitive damage awards:

> "To ask whether a particular award of punitive damages is grossly excessive begs the question: excessive in relation to what? The answer excessive in relation to the conduct of the tortfeasor may be correct, but it is unhelpful, for we are still bereft of any standard by which to compare the punishment to the malefaction that gave rise to it. A reviewing court employing this formulation comes close to relying upon nothing more than its own subjective reaction to a particular punitive damages award in deciding whether the award violates the Constitution. This type of review, far from imposing meaningful, law-like restraints on jury excess, could become as fickle as the process it is designed to superintend."
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> *TXO Production Corp. v. Alliance Resources Corp.,* ___ U.S. ___, ___, 125 L.Ed.2d 366, 113 S.Ct. 2711, 2725 (1993) (concurring opin. of Kennedy, J.).

at 313 (concurring opin.)). Using Factor (a) as an aggravating circumstance, however, a jury can give one defendant his life and put another to death without any means for objective distinction. There is no consistent relationship between fact and result from this kind of jury instruction.

That failing can be seen in use of Factor (a) in petitioner's case. The Court has "plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty" (*Maynard v. Cartwright, supra,* 486 U.S. at 363). Yet, the prosecutor argued below that the death penalty was warranted under Factor (a) because "this was a brutal murder" [JA 25; Sacto RT 1477].

There is no such thing as a first degree murder which is *not* horrible. As the late Justice Stewart observed: "A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman' " (*Godfrey v. Georgia, supra,* 446 U.S. at 428-429, 64 L.Ed.2d 498, 100 S.Ct. 1759). The willful, deliberate, premeditated taking of a human life with malice aforethought is a hideous act.

Nevertheless, California voters did not purport to impose the death penalty on every murderer, nor even on every murderer as to whom one or more special circumstances is found. Instead, §190.3 of the California statute, which fills more than a page of single-spaced typing, spells out an elaborate process under which the jury is instructed to weigh aggravating and mitigating factors. In

light of the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative" (*Colautti v. Franklin,* 439 U.S. 379, 392, 58 L.Ed.2d 596, 99 S.Ct. 675 (1979)), one must assume that the penalty phase was not intended to be a meaningless exercise, but an opportunity for jurors to make a rational choice between death and a lesser penalty.

Factor (a), however, is so all-inclusive that the prosecutor here was able to use it to argue that petitioner should be put to death for a reason that could be advanced in every murder prosecution. A factor that indiscriminate does not provide "principled" guidance; it does not provide any guidance whatsoever. Yet that is the consequence of identifying "circumstances of the crime" as an aggravating factor.[8]

B. THIS COURT HAS NEVER AUTHORIZED USE OF THE PHRASE "CIRCUMSTANCES OF THE CRIME" AS AN AGGRAVATING FACTOR.

The California Supreme Court's determination to uphold petitioner's death sentence rested on an invalid assumption that this Court has approved generalized reference to circumstances of the crime as an aggravating factor:

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[8] The amicus curiae brief of the California Appellate Project collects several more examples of how prosecutors have exploited the overly elastic language of Factor (a), demonstrating the unconstitutional vagueness of that aggravating factor.

> "The United States Supreme Court itself has established that the circumstances surrounding a capital offense constitute one of the criteria upon which the jury *should* base its penalty determination. [Citations.] The high court has not stated or implied that the factor of the 'circumstances of the offense' is unconstitutionally vague" [JA 156; 4 Cal.4th at 551, emphasis in original].

The state court cited *Penry v. Lynaugh*, 492 U.S. 302, 318, 106 L.Ed.2d 256, 109 S.Ct. 2934 (1989); *Booth v. Maryland*, 482 U.S. 496, 96 L.Ed.2d 440, 107 S.Ct. 2529 (1987), and *Jurek v. Texas*, 428 U.S. 262, 274, 49 L.Ed.2d 929, 96 S.Ct. 2950 (1976) for its conclusion [JA 156; 4 Cal.4th at 551].

It is true that each of those decisions speaks about jury consideration of the circumstances of the offense. But references in the three opinions to the defendant's right to have the jury consider evidence of the circumstances surrounding an offense does not validate the use of that phrase to define aggravating factors. Judicial opinions, written for judges and lawyers who read the opinions with a background knowledge of constitutional principle, can be written in a kind of shorthand unsuitable for instructions to jurors, who come to their task with no understanding of the law. Language suitable for opinions is not always specific enough to satisfy the Eighth Amendment requirement of providing objective guidance to lay jurors.

Moreover, *Penry* and *Jurek* were addressing a defendant's right to have the jury consider the circumstances of the offense as part of his case in mitigation (*Penry, supra*, 492 U.S. at 313-316; *Jurek, supra*, 428 U.S. at 274-276). *Booth* explained that the character of the individual defendant

and the circumstances of the crime were relevant facets of the constitutionally required " 'individualized determination' of whether the defendant should be executed" (482 U.S. at 502, quoting *Zant v. Stephens, supra*, 462 U.S. at 879).[9]

None of these cases suggested that "the circumstances of the crime," without some limiting definition, would satisfy the requirement of providing the necessary "specific and detailed guidance" required to define aggravating factors.

IV. THE UNDIFFERENTIATED LIST OF PENALTY FACTORS READ TO THE JURY DID NOT PROVIDE MEANINGFUL GUIDANCE.

While some death penalty statutes specify which factors are aggravating and which are mitigating, California's Penal Code §190.3 simply lists factors without classifying them. Tracking the language of the statute, the instructions here told petitioner's jury to "consider, take into account and be guided by" the statutory list in the weighing process, leaving it to the jury to decide how to treat each factor.

By lumping aggravating and mitigating factors into a single list, California has created a reasonable likelihood that juries will treat the absence of factors which should establish mitigation, or have no effect at all, as aggravating factors to be weighed in favor of death. This is

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[9] In *Payne v. Tennessee*, ___ U.S. ___, 111 S.Ct. 2597 (1991), this Court overruled *Booth's* holding barring victim impact evidence.

precisely what the prosecutor's argument invited the jury to do at petitioner's trial.

The California Supreme Court has construed §190.3 and held that at least six of the factors can be given mitigating effect only. These are: extreme mental or emotional disturbance (Factor (d)); victim participation or consent (Factor (e)); defendant's reasonable belief in moral justification or extenuation (Factor (f)); duress or substantial domination by another person (Factor (g)); impairment by mental disease, defect, or intoxication (Factor h)); and accomplice/relatively minor participation by defendant (Factor (j)) (*People v. Davenport*, 41 Cal.3d 247, 288-289, 221 Cal.Rptr. 794, 710 P.2d 861 (1985); *People v. Melton*, 44 Cal.3d 713, 769, 244 Cal.Rptr. 867, 750 P.2d 741 (1988), cert. denied 488 U.S. 934; *People v. Lucero*, 44 Cal.3d 1006, 1031, fn. 15, 245 Cal.Rptr. 185, 750 P.2d 1342 (1988); *People v. Hamilton*, 48 Cal.3d 1142, 1184, 259 Cal.Rptr. 701, 774 P.2d 730 (1989), cert. denied 49 U.S. 1039).[10] These factors are irrelevant if there is no evidence on the particular issue.

The problem is that, while California decisions establish these rules limiting application of the Penal Code §190.3 factors, no one explained that to petitioner's jury.[11]

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[10] Concerning Factor (j), please see footnote 13, below.

[11] The California Supreme Court has declined to require either that irrelevant factors be stricken from the list, or that the jury be advised that certain factors can be given mitigating effect only (e.g., *People v. Sims*, 5 Cal.4th 405, 465, 20 Cal.Rptr. 537, 853 P.2d 992 (1993); *People v. Raley*, 2 Cal.4th 870, 919, 8 Cal.Rptr. 678, 830 P.2d 712 (1992), cert. denied ___ U.S. ___, 122 L.Ed.2d 733; *People v. Miranda*, 44 Cal.3d 57, 104-105, 241 Cal.Rptr. 594, 744 P.2d 1127 (1987), cert. denied 486 U.S. 1038; *People v. Ghent*, 43 Cal.3d 739, 776-777, 239 Cal.Rptr 82, 739 P.2d 1250 (1987), cert. denied 485 U.S. 929; *People v. Jackson*, 28 Cal.3d 264, 316, 168 Cal.Rptr. 603, 618 P.2d 149 (1980), cert. denied 450 U.S. 1035).

As a result, the jury was invited to weigh in aggravation, and may have rested its verdict on, illusory circumstances.

The failure to tell the jury which factors could have only mitigating effect permitted the prosecutor to argue that "there were only two mitigating circumstances and the rest in this case are aggravating" [JA 25; Sacto RT 1476]. He counted factors on the basis of an assumption that a nonexistent mitigating factor should be treated as an aggravating circumstance, including in his list the exclusively mitigating factors set forth above [JA 26-28; Sacto RT 1476-1479]. Thus, the prosecutor asserted that because petitioner was not mentally ill, his rationality constituted a circumstance in aggravation:

> "There was no evidence that he had any kind of a mental derangement, other than what anybody who would do that would have. And the evidence was that he, again, that he was rational at the time of this offense, that he knew what he was doing, he knew it was wrong, that's why he cleaned up and that's why he took precautions not to get caught. [¶] . . . He didn't want to get caught. He knew what he was doing. *That is a circumstance in aggravation*" [JA 26; Sacto RT 1477-1478, emphasis added].

In a similar vein, the prosecutor maintained that the victim's lack of participation in the killing, petitioner's

lack of reasonable belief that the offense was morally justified, and the fact that petitioner was not intoxicated, as well as the fact that petitioner acted without an accomplice, all should be treated as aggravating circumstances [JA 26-27; Sacto RT 1479-1481].[12]

If absence of mitigating evidence is tantamount to an aggravating circumstance, and both the presence and the absence of a factor can constitute aggravation, the scales are tipped inexorably in death's direction. This approach is impossible to reconcile logically with the principle that the death penalty is never automatic.

Under this aggravation-by-absence approach, whenever there is no evidence on a factor listed in Penal Code §190.3, the prosecutor will be able to put another aggravating factor on death's side, to counterbalance whatever mitigating evidence a defendant does produce. This is a gimmick, not a principled means of distinguishing defendants who do and do not deserve the death penalty (*Maynard v. Cartwright, supra,* 486 U.S. at 362).

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[12] The trial court did give an instruction designed to prevent the jury from aggravating on the basis of a mere failure of proof (for example, if the jury was left uncertain whether petitioner was intoxicated or had acted as an accomplice):

> "If a factor is not found by you to be a mitigating factor, that in and of itself does not make that factor an aggravating factor. In order for a factor to be considered an aggravating factor, you must be satisfied beyond a reasonable doubt that the factor does exist, and it is only if you determine that the factor exists beyond a reasonable doubt that you may consider the factor an aggravating factor" [JA 80; CT 458].

Two examples of how individual penalty phase factors are used arbitrarily appear on the record of this case. Whereas most jurisdictions treat "youth" as mitigating, California puts the "age of the defendant" into its all-purpose list as Factor (i). Consequently, California prosecutors and judges have in some cases treated defendants' ages as aggravating regardless of what those ages were, and in other cases treated identical ages as aggravating, mitigating or neutral, apparently by whim.

> "If the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm."
>
> *Arave v. Creech, supra,* 507 U.S. at ___, 113 S.Ct. at 1542.

Everyone has an age. Instructing a jury in terms of Factor (i) permits virtually any aspect of a defendant's character, no matter how irrelevant, to be become an aggravating factor under the guise of "age." The opening brief in *Tuilaepa v. California,* No. 93-5131, discusses at some length the contradictory ways California prosecutors have used Factor (i).

In similar disregard for jury guidance, California puts "relatively minor" accomplice liability on the same undifferentiated list, as Factor (j). Prosecutors have seized on that to argue that a murder committed without accomplices is aggravated. The prosecutor suggested that in petitioner's case [JA 28-29; Sacto RT 1479-1481], and the trial judge agreed [Sacto RT 1627-1628]. As the debate between the majority and concurring opinions below

attests,[13] the California Supreme Court has not yet been able to reach a consistent conclusion about whether that argument is correct. If justices of the California Supreme Court cannot agree amongst themselves how a penalty factor works, one cannot expect a lay jury to apply that factor in a rational and consistent manner.

V. THE COURT SHOULD REVERSE THE DEATH SENTENCE AND REMAND WITH DIRECTIONS TO CONDUCT A NEW PENALTY TRIAL WITH PROPERLY DEFINED AGGRAVATING FACTORS.

The combination of defects in the factors submitted for the jury's consideration with the instruction that, if the jury found aggravation to outweigh mitigation, it "shall impose" the death penalty, could not help but tip the scales toward death. Therefore, the judgment must be reversed.

Ordinarily, when this Court reverses a death sentence because the sentencer has considered an invalid aggravating factor, the state supreme court has three alternatives: It can remand for resentencing, reweigh the evidence itself without the invalid factor, or determine that the

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[13] The state supreme court acknowledged that 13 of its past decisions had treated Factor (j) as mitigating only, yet upheld its use as aggravating in petitioner's case, citing a recent decision [JA 159-60; 4 Cal.4th at 553-554]. In other words, the state has now resurrected uncertainty about whether Factor (j) can be given aggravating effect, illustrating the difficulty a jury must face in attempting to discover the legal rules governing its consideration of the sentencing factor without guidance in the jury instructions.

factfinder's weighing of the invalid factor was constitutionally harmless error (*Clemons v. Mississippi, supra*, 94 U.S. 752-753, 110 S.Ct. at 1451). In this case, only the first of those alternatives will guarantee that petitioner's Eighth and Fourteenth Amendment rights are protected.

In California, a death penalty defendant is entitled to have a jury decide the penalty regardless of whether the conviction came about by reason of a guilty plea, court trial or jury trial (see Penal Code §190.4).

> "[I]t is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion [Citations], and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State."
>
> *Hicks v. Oklahoma*, 447 U.S. 343, 346, 65 L.Ed.2d 175, 100 S.Ct. 2227 (1980).

A fortiori, when the interest is not just liberty, but the defendant's life, he has a legitimate expectation of a jury decision.

The California Supreme Court could not fairly find the errors discussed here to be harmless beyond reasonable doubt. There is no way of knowing how the jury might have used the circumstances of the crime factor, which factors the jury treated as aggravating circumstances and which as mitigating, or how much weight was assigned to any factor. Thus, any conclusion that such errors were harmless would be purely speculative.

In order for an appellate court to conduct harmless error analysis, under the instructions given in petitioner's case, it would first have to step into the jury's shoes (in violation of due process) and arbitrarily assign to jurors an interpretation of the instructions which may not be the one the jury used at all.

The state cannot deny a defendant "the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury might have imposed a sentence equally as harsh" had it been correctly instructed (*Hicks v. Oklahoma, supra,* 447 U.S. at 346, emphasis by the Court). "Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process" (*Id.*).

The only appropriate remedy, therefore, is to reverse and remand with directions that the California Supreme Court order a new penalty trial for petitioner, to be conducted with appropriate limitations on use of the §190.3 factors,[14] or in the alternative to order that petitioner be sentenced to life in prison without possibility of parole.

CONCLUSION

"The generality of a law inflicting capital punishment is one thing. What may be said of the validity of a law on the books and what may be done with the law in its application do, or may, lead to quite different conclusions" (*Furman, supra,* 408 U.S. at 242). What was done with Penal Code §190.3 in this case produced a death

[14] Presumably, the California Supreme Court would determine these limitations based on this Court's guidance.

sentence which unmistakably violated the Eighth Amendment.

Justice "is traditionally thought of as maintaining or restoring a balance or proportion, and its leading precept is often formulated as 'Treat like cases alike'; though we need to add to the latter 'and treat different cases differently' " (H.L.A. Hart, *The Concept of Law,* p. 155 (1961)). The jury instructions failing to distinguish between aggravating and mitigating factors, and allowing consideration of undefined "circumstances of the crime" as an aggravating factor, made such treatment impossible. By failing to give the jury principled guidance through clear and objective standards for imposing the death penalty, the instructions placed a thumb on death's side of the scale.

The Court should reverse the penalty judgment with directions to retry that part of the case.

Dated: January 31, 1994

Respectfully submitted,

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APPENDIX

RELEVANT CALIFORNIA STATUTES
(1982 versions)

Penal Code §190.1

"A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:

"(a) The question of the defendant's guilt shall first be determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2 except for a special circumstance charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 where it is alleged that the defendant had been convicted in a prior proceeding of the offense of murder in the first or second degree.

"(b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 which charges that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree, there shall thereupon be further proceedings on the question of the truth of such special circumstance.

(subdivision (c) omitted)

Penal Code §190.2

"(a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any

case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:

"(1) The murder was intentional and carried out for financial gain.

"(2) The defendant was previously convicted of murder in the first degree or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed murder in the first or second degree.

"(3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree.

"(4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden or concealed in any place, area, dwelling, building or structure, and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

"(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest or to perfect, or attempt to perfect an escape from lawful custody.

"(6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or cause [sic] to be mailed or delivered and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

"(7) The victim was a peace officer as defined in Section 830.1, 830.2, 830.3, 830.31, 830.35, 830.36, 830.4, 830.5, 830.5a, 830.6, 830.10 830.11 or 830.12, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties; or the victim was a peace officer as defined in the above enumerated sections of the Penal Code, or a former peace officer under any of such sections, and was intentionally killed in retaliation for the performance of his official duties.

"(8) The victim was a federal law enforcement officer or agent, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a federal law enforcement officer or agent, engaged in the performance of his duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his official duties.

"(9) The victim was a fireman as defined in Section 245.1, who while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a fireman engaged in the performance of his duties.

"(10) The victim was a witness to a crime who was intentionally killed for the purpose of

preventing his testimony in any criminal proceeding, and the killing was not committed during the commission, or attempted commission of a crime to which he was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his testimony in any criminal proceeding.

"(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this state or any other state, or a federal prosecutor's office and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

"(12) The victim was a judge or former judge of any court of record in the local, state or federal system in the State of California or in any other state of the United States and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

"(13) The victim was an elected or appointed official or former official of the Federal Government, a local or State government of California, or of any local or state government of any other state in the United States and the killing was intentionally carried out in retaliation for or to prevent the performance of the victim's official duties.

"(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.

"(15) The defendant intentionally killed the victim while lying in wait.

"(16) The victim was intentionally killed because of his race, color, religion, nationality or country of origin.

"(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:

(i) Robbery in violation of Section 211.

(ii) Kidnapping in violation of Sections 207 and 209.

(iii) Rape in violation of Section 261.

(iv) Sodomy in violation of Section 286.

(v) The performance of a lewd or lascivious act upon person of a child under the age of 14 in violation of Section 288.

(vi) Oral copulation in violation of Section 288a.

(vii) Burglary in the first or second degree in violation of Section 460.

(viii) Arson in violation of Section 447.

(ix) Train wrecking in violation of Section 219.

"(18) The murder was intentional and involved the infliction of torture. For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.

"(19) The defendant intentionally killed the victim by the administration of poison.

(b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

"The penalty shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

Penal Code §190.3

"If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true- . . . the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or

violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

* * *

"Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

"The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence be imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

"In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

"(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

"(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

"(c) The presence or absence of any prior felony conviction.

"(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

"(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

"(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

"(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects [sic] of intoxication.

"(i) The age of the defendant at the time of the crime.

"(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

"(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

"After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole."

Penal Code §190.4

"(a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to Subdivision (b) of Section 190.1.

"In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that is not true [sic]. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Whenever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

"If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people.

"If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of the separate penalty hearing.

"In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach a unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by an unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and in the court's discretion

shall either order a new jury impaneled to try the issues the previous jury was unable to reach the unanimous verdict on, or impose a punishment of confinement in state prison for a term of 25 years.

"(b) If defendant was convicted by the court sitting without a jury the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.

"If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole.

"(c) If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to Section 1026, the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.

"(d) In any case in which the defendant may be subject to the death penalty, evidence presented at any prior phase of the trial, including any proceeding upon a plea of not guilty by reason of insanity pursuant to Section 1026 shall be considered on any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

"(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to subdivision 7 of Section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

"The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes. The denial of the modification of the death penalty verdict pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the People's appeal pursuant to paragraph (6)."